SUPREME COURT, U. S.

JUN 30 1970

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. 337

THOMAS TIERNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Table of Authorities	iii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
(1) THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT INTERPRETING THE PRINCIPLE OF COLLATERAL ESTOPPEL AND THE PROCEDURES TO BE USED IN ASSERTING THAT CONSTITUTIONAL RIGHT IS A DECISION OF A FEDERAL CONSTITUTIONAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT IN SEALFON v. UNITED STATES, 332 U.S. 575, 68 S.Ct. 237 (1948), AND ASHE v. SWENSON, 90 S.Ct. 1189 (1970).	13

Page

(2) THE SAID DECISION OF SAID COURT OF APPEALS ON THE QUESTION OF DEFENDANT'S RIGHT TO HAVE ACCESS TO GRAND JURY TESTIMONY OF A WITNESS AFTER THE GOVERNMENT HAD INDICATED IT WILL NOT CALL THAT WITNESS TO THE STAND IS A DECISION OF A FEDERAL QUESTION IN CONFLICT WITH THE GUIDELINES SET FORTH BY THE UNITED STATES SUPREME COURT IN DENNIS v. UNITED STATES, 384 U.S. 855, 86 S.Ct. 1840, AND IS IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE CIRCUIT OF THE DISTRICT OF COLUMBIA IN ALLAN v. UNITED STATES, 390 F.2d 476 (D.C.Cir. 1968); YOUNG v. UNITED STATES, 406 F.2d 960 (D.C.Cir. 1968), AND GAITHER v. UNITED STATES, 413 F.2d 1061 (D.C.Cir. 1969). 20

CONCLUSION 26

APPENDIX "A" ORDER OF THE COURT OF APPEALS

APPENDIX "B" JUDGMENT OF THE COURT OF APPEALS

APPENDIX "C" ORDER DENYING REHEARING

TABLE OF AUTHORITIES

Cases	Page
Allan v. United States, 390 F.2d 476 (D.C.Cir. 1968)	3, 20-22
Ashe v. Swenson, 90 S.Ct. 1189 (1970)	3, 13, 14, 17, 19
Brady v. Maryland, 373 U.S. 83	9, 10, 21
Cosgrove v. United States, 224 F.2d 146 (1954)	16
Dennis v. United States, 382 U.S. 855, 86 S.Ct. 1840 (1966)	3, 20, 21, 24
Gaither v. United States, 413 F.2d 1061 (D.C.Cir. 1969)	3, 20, 22
Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, reh. denied 329 U.S. 818, 67 S.Ct. 26 (1946)	16
Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 79 S.Ct. 1237 (1959)	22

	Page
Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237 (1948)	2, 3, 13, 15, 17, 19
Young v. United States, 406 F.2d 960 (D.C. Cir. 1968)	3, 20, 22
Constitution	
United States Constitution	
Fifth Amendment	7, 12, 13
Sixth Amendment	24
Statutes	
California Penal Code, §925	23
Iowa Code Annotated, §772.4	24
Kentucky Rev. Criminal Code, §110	24
Minnesota Statutes Annotated, §628.04	24
Oklahoma Statutes, Title 24, §340	24
28 U.S.C. §1254(1)	2
Texts	
Calkins, Grand Jury Secrecy, 63 Mich.L.R. 455 (1965)	22
38 Fordham L.R. 307 (Dec. 1969)	24

Texts (Continued) Page

Seltzer, Pretrial Discovery of Grand Jury Testimony in Criminal Cases, 66 Dickinson L.R. 379 (1962) 23

Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Virginia L.R. 668 (1962) 23

Watts, Grand Jury: Sleeping Watch Dog or Expensive Antique? 37 No. Carolina L.R. 290 (1959) 23

Younger, The Grand Jury Under Attack, 46 J.Crim.L., C. & P.S. 26 (1955) 23

Rules

Federal Rules of Criminal Procedure:

Rule 6(e) 3, 24, 25

Miscellaneous

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial, §2.1(a)(iii) 23

IN THE

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THOMAS TIERNEY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, THOMAS TIERNEY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 7, 1970. A Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on May 27, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The order of the United States Court of Appeals denying a Petition for Rehearing also appears in the appendix. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 7, 1970. The Petition for Rehearing was denied May 27, 1970. This Court's jurisdiction is invoked under Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

(1) Was the decision of the Court of Appeals for the Ninth Circuit interpreting the principle of collateral estoppel and the procedures to be used in asserting that constitutional right, a decision of a federal question in direct conflict with applicable decisions of the United States Supreme Court in Sealfon v. United States,

332 U.S. 575, 68 S.Ct. 237 (1948), and Ashe v. Swenson, 90 S.Ct. 1189 (1970).

(2) Was the said decision of said Court of Appeals on the question of defendant's right to have access to grand jury testimony of a witness after the Government had indicated it would not call that witness to the stand, a decision of a federal question in conflict with the guidelines set forth by the United States Supreme Court in Dennis v. United States, 382 U.S. 855, 86 S.Ct. 1840 (1966), and in conflict with the decisions of the Court of Appeals for the Circuit of the District of Columbia in Allan v. United States, 390 F.2d 476 (D.C.Cir. 1968), Young v. United States, 406 F.2d 960 (D.C.Cir. 1968), and Gaither v. United States, 413 F.2d 1061 (D.C.Cir. 1969).

STATUTORY PROVISIONS INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure, Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of juror may be made to the attorneys for the

Government for use in the performance of their duties. Otherwise the juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule . . .

STATEMENT OF THE CASE

A federal grand jury for the Central District of California indicted THOMAS TIERNEY on March 22, 1967. This indictment was superseded on June 14, 1967 by Indictment No. 37189 which alleged in three counts:

(1) That he conspired with Arthur Carr and Donald Dean Davidson to make and sell counterfeit $10 and $20 federal

reserve notes; as overt acts of this conspiracy it was alleged that on May 21, 1966, unindicted co-conspirators, David Davenport and Andrew King, manufactured approximately 100,000 counterfeit $10 federal reserve notes, and that on or about August 24, 1966, unindicted co-conspirators, Darrell Davenport and Donald Davidson, manufactured approximately 100,000 counterfeit $20 federal reserve notes.

(2) Count 2 of the indictment charged the petitioner with aiding and abetting Davenport and King in the manufacturing of the counterfeit $10 federal reserve notes.

(3) Count 3 of the indictment charged the petitioner with aiding and abetting Davenport and Davidson in producing the counterfeit $20 federal reserve notes.

The overt acts of the conspiracy count were the same acts that TIERNEY was alleged to have aided and abetted in counts 2 and 3 of the indictment.

On October 30, 1967, trial of the indictment commenced, but after two days a mistrial was declared when Andrew King, a Government witness, invoked the Fifth Amendment half-way through his direct examination.

The petitioner was tried again in a proceeding which began on November 2, 1967. Throughout that proceeding, the petitioner did not contest the fact that he had participated in the making of the counterfeit money but contended that his participation was involuntary in that his actions were the result of threats and coercion by an individual known to him as Michael Fitzgerald, but also known as Michael Francis. Mr. Tierney's claim of duress was supported not only by his own witnesses but by Government witnesses as well.

On November 13, 1967, the jury returned a verdict acquitting the defendant of the conspiracy charge but were unable to reach a verdict on the two aiding and abetting counts. A mistrial on those two counts was declared.

Some eleven months before the commencement of the third and final trial, petitioner filed a motion in the trial court to dismiss, alleging that the conspiracy acquittal collaterally estopped the Government from retrying him on the charges of aiding and abetting (C.T. pp. 123-136). This motion was supported by a detailed summary of the testimony at the conspiracy trial and was also supported by excerpts of testimony from that trial (C.T. pp. 128-135). The thrust of petitioner's argument was that the elements of the offense of conspiracy and that of aiding and abetting as they apply to the facts in this case were essentially the same. Since the identical evidence was to be used in order to establish the aiding and abetting, petitioner maintained that a retrial would violate his constitutional rights as set forth in the Fifth Amendment.

In addition to the motion to dismiss, counsel for the petitioner also moved that he be provided with the address of Michael Francis by the United States Attorney's office in order to aid in the preparation of the defense.

The court denied petitioner's motion to dismiss but granted the request for Michael Francis's address and ordered the United States Attorney's office to provide the defense with that information.

In July of 1968, some five months before the third trial, Robert J. Vars, one of the trial counsel for the petitioner, received a letter from Robert R. Lee to the effect that Mr. Lee was an attorney who represented Michael Francis and that his client had given testimony before the federal grand jury regarding the petitioner and had obtained immunity from the federal government because of his cooperation. In December of 1968, approximately one week before the trial, Vars met with Francis at Mr. Lee's office and was informed that Francis had testified before the federal grand jury concerning Mr. Tierney's participation in the counterfeiting plot, had received immunity from the Government, and was a possible witness at the retrial. Mr. Vars attempted to question Francis but Francis refused to divulge any information regarding his involvement in the case or his

testimony before the grand jury.

The third and last trial of Mr. Tierney commenced on December 10, 1968. Prior to the taking of any testimony, the Government attorney disclosed to defense counsel that they were not going to call Francis as a witness for the Government and that pursuant to the guidelines set forth by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, that the Government felt that it was incumbent upon it to disclose that Francis had related certain "facts" which might be favorable to the defense and which had not been disclosed previously.

Petitioner's counsel moved once again for a dismissal relying or the principle of collateral estoppel, but this motion was denied.

After the jury was selected, defense counsel moved the court to compel discovery of the grand jury transcript as it referred to testimony by Francis (R.T. 88). Counsel's argument was based primarily on the requirement of disclosure of favorable evidence to the accused set forth in Brady

v. Maryland, supra. This motion was also denied.

The Government's case at this third trial was identical to the case put forth by the Government at the second trial. Again, there was no contention that Mr. Tierney had not participated in the production of the counterfeit bills, and again, there was evidence adduced from the testimony of the Government witnesses as well as the witnesses who testified for the defense that Mr. Tierney's participation was the result of coercion by Michael Francis.

During the course of the trial, the defense once again requested a copy of the transcript of Michael Francis's grand jury testimony and, as had been the case previously, this motion was denied. It was the court's position that it was the burden of the defense to show a "particularized" need for the testimony but offered to examine the transcript in camera so that the court could determine whether there was any favorable evidence to the defense. Counsel for the defense refused this offer, apparently feeling that only the defense

counsel could determine whether the material was useful to the defense (R.T. pp. 406, 407). At the close of the prosecution's case, petitioner's motions regarding the collateral estoppel issue were renewed and denied (R.T. pp. 415-417).

The only opportunity that defense counsel had to speak with Michael Francis took place during recesses from the trial proceedings, and defense counsel were able to obtain only sketchy information from Mr. Francis about his involvement in coercing defendant to cooperate in the counterfeiting operation. As a result of their inability to receive the minutes of Michael Francis's grand jury testimony and as a result of Mr. Francis's obvious lack of desire to speak with defense counsel, defense counsel were placed in the awkward position of either calling Francis to the stand without any knowledge as to what he would say or what he had previously testified to before the grand jury or attempting to support the coercion defense without Mr. Francis's testimony. Defense counsel chose the latter course.

During the course of the prosecution's summation, counsel for the Government in discussing Michael Francis's failure to take the stand and the granting of immunity to him stated that the purpose of the immunity was to remove the protection of the Fifth Amendment so that a "witness cannot hide behind the Fifth Amendment when he testifies, he has to testify, and because he is compelled to testify he has been given immunity" (R.T. p. 811).

At the termination of the prosecution's argument, defense counsel moved for a mistrial based upon the claim that Government counsel's statements regarding the Fifth Amendment reflected directly upon the defendant's failure to take the stand. The motion for mistrial was denied and Mr. Tierney was convicted on both counts. Subsequently, a motion for a new trial was denied and the petitioner was sentenced to a four year prison term.

REASONS FOR GRANTING THE WRIT

(1) THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT INTERPRETING THE PRINCIPLE OF COLLATERAL ESTOPPEL AND THE PROCEDURES TO BE USED IN ASSERTING THAT CONSTITUTIONAL RIGHT IS A DECISION OF A FEDERAL CONSTITUTIONAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT IN SEALFON v. UNITED STATES, 332 U.S. 575, 68 S.Ct. 237 (1948), AND ASHE v. SWENSON, 90 S.Ct. 1189 (1970).

This Court recently held in Ashe v. Swenson, 90 S.Ct. 1189 (1970), that the principle of collateral estoppel was embodied in the Fifth Amendment guaranty against double jeopardy. Ashe v. Swenson, supra, at 1195.

> "For whatever else that constitutional guaranty may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, it surely protects a man who has been acquitted from having to 'run the gauntlet a second time." Ibid.

In the Ashe decision, the Court interpreted the principle of collateral estoppel to mean simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in any future lawsuit. Ashe v. Swenson, supra, at p. 1194.

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have granted its verdict upon an issue other than that which the defendant

seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings.' Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 240. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." Ibid.

This Court in Sealfon v. United States, supra, in ruling upon a conviction on the substantive offense after an acquittal on a conspiracy charge had taken place, stated that "the core of the prosecutor's case was in each case the same" and reversed the conviction.

As indicated in the Statement of the Case set forth above, the petitioner made several motions both prior to and during

the course of the third and final trial to dismiss the indictment and to bar the re-trial on the basis of the principle of collateral estoppel. The petitioner's argument was consistent with the opinion in the Sealfon case that no rational jury could have reached its verdict acquitting him of the conspiracy charge unless it believed that he had acted under duress while participating in the production of the counterfeit money. It was petitioner's claim that certainly as regarding the facts adduced at the second trial, the issue of defendant's state of mind, wilfulness and voluntariness, as same related to the conspiracy, and that of aiding and abetting were so nearly identical as to give rise to collateral estoppel.

There is little doubt that an affinity exists between the concept of conspiracy on one hand and the concepts of concerted action and aiding and abetting on the other. See Pinkerton v. United States, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, reh. denied 329 U.S. 818, 67 S.Ct. 26 (1946); Cosgrove v. United States, 224 F.2d 146 (1954).

The retrial on the aiding and abetting charge merely gave the Government another opportunity to prove that which the jury had not believed in acquitting Mr. Tierney of the conspiracy charge -- that he had voluntarily participated in a scheme to counterfeit money. To differentiate between the concept of conspiracy and that of aiding and abetting under the instant facts would indeed constitute a rejection of the rule of collateral estoppel in criminal proceedings. In connection with aiding and abetting it must be proved that the accused shared in the criminal intent of the principal and that there must exist a community of unlawful purpose at the time the act is committed. Surely on the facts presented herein where there was no dispute regarding the participation of Mr. Tierney, and his culpability revolved around his state of mind and specifically whether he acted under duress at the time of the commission of the acts, a differentiation between the two crimes is contrary to the requirements set forth in Ashe, supra, and Seaffon, supra, that the principle of collateral estoppel be

applied with realism and rationality.

If Mr. Tierney did not act under duress, it is clear from the evidence adduced at both trials that he was a conspirator. The evidence referred to active participation and planning by Mr. Tierney.

On the other hand, if, as the jury apparently believed at the second trial, Mr. Tierney was not a member of the conspiracy because he acted under duress, it is abundantly clear that he should not have been forced to "run the gauntlet" the second time.

It should be noted that the United States Court of Appeals for the Ninth Circuit in ruling on the question of collateral estoppel laid heavy emphasis upon the fact that "Tierney did not support his motion with either a summary of the evidence or a transcript of his second trial." (Appendix "A", p. 2.)

The Court of Appeals held, relying on that "fact" that "since Tierney did not give the trial court a complete transcript of his conspiracy trial, the trial court properly refused to hold that the

Government was collaterally estopped." (Appendix "A", p. 2.)

As indicated previously, petitioner did support his pretrial motions on the question of collateral estoppel with a summary of the evidence and in fact provided the court with excerpts of relevant testimony (C.T. pp. 128-136). Moreover, the decisions of this Court in both Ashe, supra, and Sealfon, supra, seem to stand for the proposition that a trial court is required to review the evidence and other relevant matter when the defense of collateral estoppel is raised and that the trial court is not relieved of its responsibility of looking into the merits of this important constitutional claim merely because the defendant has not accompanied his motion with a complete copy of its transcript of the previous proceeding.

(2) THE SAID DECISION OF SAID COURT OF APPEALS ON THE QUESTION OF DEFENDANT'S RIGHT TO HAVE ACCESS TO GRAND JURY TESTIMONY OF A WITNESS AFTER THE GOVERNMENT HAD INDICATED IT WILL NOT CALL THAT WITNESS TO THE STAND IS A DECISION OF A FEDERAL QUESTION IN CONFLICT WITH THE GUIDELINES SET FORTH BY THE UNITED STATES SUPREME COURT IN DENNIS v. UNITED STATES, 384 U.S. 855, 86 S.Ct. 1840, AND IS IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE CIRCUIT OF THE DISTRICT OF COLUMBIA IN ALLAN V. UNITED STATES, 390 F.2d 476 (D.C.Cir. 1968); YOUNG v. UNITED STATES, 406 F.2d 960 (D.C.Cir. 1968), AND GAITHER v. UNITED STATES, 413 F.2d 1061 (D.C.Cir. 1969).

In Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966), this Court stated that "in the American adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts, and exceptions to this are justifiable only by the clearest and most compelling considerations." (384 U.S. at p. 873.) The Court went on to say that

there was a growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. (384 U.S. at p. 870.)

The decision in Dennis which significantly broadened a defendant's right to obtain transcripts of grand jury testimony was consistent with the decision of this Court in Brady v. Maryland, supra, which held that the withholding of evidence favorable to an accused upon request violated due process irrespective of the good faith or bad faith of the prosecution.

It is the petitioner's contention that it violates the traditional concepts of due process to deny an accused access to grand jury minutes, particularly, as in the case before the Court, where an accused has been harmed thereby.

In Allan v. United States, 390 F.2d 476 (D.C.Cir. 1968), the Court of Appeals for the District of Columbia permitted access to grand jury minutes, ruling that they should in most circumstances be available through a pretrial motion.

In Young v. United States, 406 F.2d 960 (D.C.Cir. 1968), the Court of Appeals for the District of Columbia agreed that where a witness did not testify there was usually no need for continued secrecy.

In Gaither v. United States, 413 F. 2d 1061 (D.C.Cir. 1969), the Court of Appeals for the District of Columbia held that it was better as a practical matter to move before trial for production of grand jury testimony following Allan v. United States, supra.

The traditional reasons for the maintenance of secrecy of grand jury proceedings as set forth in the dissenting opinion of Justice Brennan in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405, 79 S.Ct. 1237, 1244 (1959) were certainly not present in the matter before this Court. There had been two previous trials prior to the proceeding which resulted in the conviction.

Recent commentaries have been uniformly critical of the prominent secrecy of grand jury minutes: Calkins, Grand Jury Secrecy, 63 Mich. L.R. 455 (1965);

Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Virginia L.R. 668 (1962); Seltzer, Pretrial Discovery of Grand Jury Testimony in Criminal Cases, 66 Dickinson L.R. 379 (1962); Watts, Grand Jury: Sleeping Watch Dog or Expensive Antique?, 37 No. Carolina L.R. 290 (1959); Younger, The Grand Jury Under Attack, 46 J.Crim.L., C.& P.S. 26, 214 (1955).

The Advisory Committee of the American Bar Association on discovery and procedure before trial has recommended making available to the accused in advance of trial the testimony of prospective witnesses against him at the trial and regards this as an appropriate invasion of traditional grand jury secrecy, consistent with the investigative purposes for which such secrecy should otherwise be retained. See American Bar Association project on minimum standards for criminal justice, Standards relating to discovery and procedure before trial, §2.1(a)(iii).

At least five states now grant an absolute right to defendants to inspect relevant grand jury minutes prior to the trial. See California Penal Code, §925;

Iowa Code Annotated §772.4; Kentucky Rev. Criminal Code, §110; Minnesota Statutes Annotated, §628.04; Oklahoma Statutes, Title 24, §340.

In a recent study of Rule 6(e) of the Federal Rules of Criminal Procedure, the Fordham Law Review recommended that the rule be amended to permit as a matter of right a defendant or his attorney to examine and copy the minutes of grand jury proceedings upon which the defendant was indicted including the testimony of witnesses appearing before the grand jury. See 38 Fordham L.R. 307, 317 (Dec. 1969). The article defended its position by stating that the original rationale of grand jury secrecy was no longer persuasive and that non-disclosure of grand jury testimony could be deemed violative of procedural due process and violative of defendant's Sixth Amendment right to confrontation.

While it is true that the trial court indicated its willingness to look at the transcript in camera, this Court in Dennis v. United States, supra, emphasized that it is enough for judges to judge and that only an advocate could properly and

effectively determine what might be useful to the defense.

In the matter before the Court the prosecution knew what Michael Francis had testified to before the grand jury and it was crucial to the defense that they should know what he had said there. Without access to the grand jury transcript, the defendant was at a distinct disadvantage in relation to the prosecution -- a disadvantage totally unjustifiable and inconsistent with due process requirements.

Denying access to the defense of Francis's grand jury testimony was instrumental in the defense decision not to put Francis on the stand, and Francis's failure to testify on behalf of the defendant on the issue of coercion was emphasized by the prosecuting attorney throughout his summation period. Obviously, the defendant was severely harmed by his inability to gain access to the grand jury minutes.

Rule 6(e) of the Federal Rules of Criminal Procedure as applied herein violates the right of an accused to due process of law.

CONCLUSION

The importance of the questions raised in this Petition cannot be overstated and for the reasons outlined above, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. THOMAS TIERNEY, *Appellant.*	No. 24072

[April 7, 1970]

On Appeal from the United States District Court for the Central District of California

Before: BROWNING and HUFSTEDLER, Circuit Judges, and SOLOMON*, District Judge

SOLOMON, District Judge:

Thomas Tierney appeals from a conviction for aiding and abetting the counterfeit of federal reserve notes. Tierney was indicted for one count of conspiring to counterfeit and for two counts of aiding and abetting the manufacture of counterfeit federal reserve notes. He pleaded not guilty to each count. His first trial ended in a mistrial when a government witness invoked the Fifth Amendment. In the second trial, the jury acquitted Tierney of the conspiracy count, but did not agree on the aiding and abetting counts. The Court declared a mistrial on these two counts.

Before a retrial on the aiding and abetting counts, Tierney filed a motion to dismiss alleging that the conspiracy acquittal collaterally estopped the government from retrying him for aiding

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

and abetting. Tierney did not support his motion with either a summary of the evidence or a transcript of his second trial.

When the government informed Tierney that it would not call Mike Francis as a witness at the third trial, Tierney filed a motion to obtain a transcript of Francis' testimony before the grand jury. The Court denied the motion.

The government's evidence showed that Tierney was president of a mail order company, and that Tierney, Francis, and other individuals printed counterfeit notes on the company's printing press.

At the conclusion of the government's case, Tierney offered a partial transcript of his second trial, and again made a motion to dismiss on the basis of collateral estoppel. The Court denied the motion. Tierney then presented evidence that he participated in the counterfeiting only because Francis threatened to kill him. Tierney, however, did not testify. The jury found Tierney guilty of aiding and abetting.

Tierney contends:

1. His conspiracy acquittal collaterally estopped the government from trying him for aiding and abetting.

Conspiracy and aiding and abetting are separate offenses. *Nye & Nissen v. United States*, 336 U.S. 614 (1949). An acquittal for conspiracy does not preclude conviction for aiding and abetting unless the acquittal results in a finding of fact in favor of the defendant which is essential to the substantive offense. *Scalfon v. United States*, 332 U.S. 575 (1948).

In order to determine what the acquitting jury found, the Court must review both the evidence and the instructions. *Scalfon v. United States, supra*, at 579. Since Tierney did not give the trial court a complete transcript of his conspiracy trial, the trial court properly refused to hold that the government was collaterally estopped.

Tierney contends that *Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1954), requires the Court to apply collateral estoppel as a matter of law. Cosgrove was acquitted of conspiring to defraud the United States and was later convicted for aiding and assisting in the preparation of false estate tax returns. On appeal,

the Court held that the conspiracy acquittal collaterally estopped the government from trying Cosgrove for aiding and abetting.

Cosgrove is distinguishable. Cosgrove was an attorney who filed several estate tax returns after the dates on which they were due. His codefendant, an employee of the Department of Internal Revenue, falsely pre-dated the returns after they were received by the department.

Cosgrove was charged in the conspiracy counts with agreeing to file late returns pursuant to a plan to defraud the government. He was charged in the substantive counts with assisting his codefendant in defrauding the government. The evidence at both trials showed that Cosgrove and his codefendant planned to defraud the government, and that Cosgrove filed the returns to further their plan. Cosgrove could not have been convicted of either offense unless the jury found that he agreed with his codefendant to commit the substantive crime. By acquitting Cosgrove of conspiracy, the jury necessarily found that Cosgrove did not file the returns pursuant to an agreement to defraud. This finding negated Cosgrove's only possible act of aiding and abetting.

Here, Tierney admitted that he participated in the counterfeiting of federal reserve notes. His only defense was that he acted under duress. In order to convict Tierney of aiding and abetting, it was not necessary for the jury to find agreement; it was enough to find lack of duress. Since an illegal agreement was not an essential element of the government's case against Tierney on the aiding and abetting counts, collateral estoppel does not apply.

We have examined the entire transcript, and we find that evidence which was necessary to convict Tierney of conspiracy was not necessary to convict him for aiding and abetting.

(2) The Court erred in refusing to give him a copy of Francis' testimony before the grand jury.

In *Dennis v. United States*, 384 U.S. 855 (1966), the Court held that after a government witness has testified, a defendant may discover the witness's grand jury testimony to determine whether he made statements which would allow the defendant to impeach him. Here, Francis did not testify. The government

did not call Francis as a witness because Francis informed the government that if he was called he would give testimony favorable to Tierney.

Francis was a participant in the counterfeiting operation. Defense counsel talked to Francis several times. He knew that if called, Francis would give testimony favorable to Tierney. Tierney wanted to call Francis as a witness, but did not want Francis to make statements which were inconsistent with his grand jury testimony. Since Tierney did not need Francis' grand jury testimony except to permit Francis to tailor his trial testimony to avoid inconsistencies, the Court properly denied Tierney's motion.

(3) It was improper for the government's attorney to argue to the jury that Tierney's failure to call Francis as a witness meant that Francis' testimony would be unfavorable to Tierney.

Since Tierney did not raise this objection at the trial, he waived his right to raise it here. *Devine v. United States*, 278 F.2d 552 (9th Cir. 1960). Even if the comment was improper, it was not prejudicial because defense counsel drew the opposite inference. He argued that the government's failure to call Francis meant that Francis' testimony would be unfavorable to the government and favorable to Tierney.

(4) The Court erred in admitting testimony that Tierney manufactured counterfeit notes because he needed more money in his business.

There is no merit in this contention. Evidence of a defendant's financial condition is admissible to show his motive for committing the offense. *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968).

(5) The Court failed to instruct the jury that prior inconsistent statements are not evidence.

We find that the instruction given was both correct and sufficient.

(6) The jury's verdict is not supported by sufficient evidence.

Since Tierney admitted that he participated in the counterfeiting, the only element which the government was required to prove was criminal intent. There was ample evidence from which the jury could find intent.

(7) The United States Attorney was guilty of misconduct when he commented on Tierney's failure to take the stand.

In closing argument to the jury, the government's attorney stated:

> "Ladies and gentlemen, you will be instructed that Mike Francis was given immunity, that he was taken before a grand jury and he testified before that grand jury under a grant of immunity, and his Honor will explain to you how a grant of immunity is made; that its purpose is to remove the protection of the Fifth Amendment so that a witness can't hide behind the Fifth Amendment when he testifies, he has to testify, and because he is compelled to testify he is given immunity." (Tr. 810-811)

Tierney did not object to this comment at the trial. He contends now that the jury must have inferred from this argument that Tierney was also "hiding behind the Fifth," and the statement was therefore a comment on Tierney's failure to testify.

The test for whether there was comment on the defendant's failure to testify is: "whether the language used was manifestly intended or was of such character that a jury would naturally and necessarily take it to be such comment." *Haynes v. United States*, 368 F.2d 814 (9th Cir. 1966). The comment here fails to meet this test.

Affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. THOMAS TIERNEY, Appellant.	)	No. 24072

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 7, 1970.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. THOMAS TIERNEY, Appellant.	)	No. 24,072 O R D E R

Before: BROWNING and HUFSTEDLER, Circuit Judges, and SOLOMON, District Judge*

Late filing of the petition for rehearing is granted. The petition for rehearing is denied.

Dated: May 27, 1970.

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* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.